Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
Implementation of Section 621(a)(1) of	)	
The Cable Communications Policy Act	)	MB Docket No. 05-311
Of 1984 as Amended by the Cable	)	
Television Consumer Protection and	)	
Competition Act of 1992	)	

OPENING COMMENTS OF
CONSUMERS FOR CABLE CHOICE

I. Introduction and Summary

Consumers for Cable Choice (C4CC)[1] is an alliance of consumer organizations with members throughout the United States who are committed to the development of a competitive, vibrant cable communications market. To date our coalition represents approximately 40 consumer groups with more than 1 million members. Our goal is the creation of an open, diverse, pro-consumer market for cable subscribers that will stimulate price, choice and service options.

C4CC members are the typical American cable consumer. They have little or no choice for their cable provider and they pay unchecked and ever-increasing rates. The cable monopoly has for decades had virtually exclusive access to video consumers and was able to fend off competitive entrants. As a result, consumers suffered. Now is the time to help consumers by introducing real competition for video services. There are a number of new providers ready to enter the market and provide more choices and lower prices to consumers.

But, these new providers face large barriers to entry under the current local franchising framework. Incumbent cable companies have a regulatory advantage and are striving to maintain it in order to delay the entry of competitors. As long as the regulatory framework continues to choose

[1] Consumers for Cable Choice, Inc. is a not-for-profit corporation formed under Section 501(c)(4) of the Internal Revenue Code.

winners and losers in the local video market, consumers will be forced to pay exorbitant rates and competition will not thrive.

C4CC believes that the Commission has the legal and statutory authority to reform the cable franchising process and should use this authority immediately. This would be of enormous assistance to consumers and open the market to competition and innovation. The Commission has established a precedent of helping consumers by facilitating the entry of new providers into a market dominated by a monopoly provider, such as in the long distance market.

Full franchise reform may require legislation, which Consumers for Cable Choice supports. However, while Congress debates statutory changes, the Commission could make an immediate difference for consumers by exercising its power to expedite competition.

Consumers for Cable Choice is pleased to offer these comments in response to the Commission's Notice of Proposed Rulemaking. The C4CC comments address the following key points:

- The Current franchising process is outdated and unfriendly to consumers.
- The Commission should seek ways to streamline franchising and promote greater competition.
- The legislative history of federal cable law indicates that Congress intended to promote greater video service competition and reduce franchising barriers.
- The Commission has the statutory authority to limit the reach of local franchise authorities and prevent unnecessary obligations from being placed on new competitive entrants.
- Expanding competition in the cable service market and increasing consumer benefits from new communications technologies are twin goals that can be achieved through franchise reform.

II. The Commission Should Expedite the Local Franchising Process to Empower Consumers, Expand Cable Choices, and Lower Prices

Today, there are numerous technologies that can provide consumers with almost unlimited opportunities to enjoy a new array of video services. However, only a miniscule percentage of American consumers have access to these services and technologies. Most communities are served by only one video service provider – the traditional cable company. The Commission found that only 3.7% of cable service areas meet the standards for the existence of effective competition.[2] This monopoly arrangement is institutionalized by the outdated local franchising process, which overly burdens entry by new, technologically advanced competitors.

Consumers lose when competitors are blocked by the incumbent cable providers and the local franchise authority. Cable rates have risen 56.6% since 1996.[3] Some communities saw price hikes of over 10 % in 2005. For example, in San Francisco, California a customer who paid $36.20 for cable three years ago is today paying $47.93 for the exact same service.[4] The lost consumer surplus from a delay in reforming the franchise process and promoting competition is $8.2 billion dollars for one year of delay, or nearly $75 dollars for each American household. Four years of delay would cost consumers nearly $30 billion, or about $270 dollars per household.[5]

With this NPRM, the Commission recognizes the importance of streamlining the franchise process so that consumers can have more options for their video service and obtain lower prices. When franchise authorities do not impede competition, consumers see immediate benefits. In the select few communities where cable competition has emerged, prices have dropped. In three cities where Verizon's FIOS service is available, the incumbent cable provider lowered their prices to comparable levels with Verizon.[6] The Commission found in its 2005 *Report on Cable Industry Prices* that in communities with a wireline cable competitor, average cable rates for basic and expanded services were 15.7% lower than in communities with no competition.[7]

Franchising, while important for protecting certain local interests, should not be the dominant force in the cable marketplace. Multiple players should have the opportunity to offer a diverse range of services and consumers should have the opportunity to choose which work best. When franchising statutes were crafted, cable competition was only a dream. There were no truly viable competitors to the existing cable companies. Today, there are a number of alternative providers who use advanced technology, such as fiber to the home, to offer innovative services. Consumers could

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[2] Report on Cable Industry Prices 20 FCC Rc 2718, 2721 (2005).

[3] Report on 2004 Cable Industry Prices.

[4] See Testimony of Robert Johnson before Communications, Technology and Interstate Commerce Committee of the National Conference of State Legislatures, November 2005. http://www.consumers4choice.org/site/DocServer/Johnson.pdf?docID=361

[5] Ford, George S. and Koutsky, Thomas M. *"In Delay There Is No Plenty:" The Consumer Welfare Cost of Franchise Reform Delay.* Phoenix Center Policy Bulletin No.13. January 2006. Pg. 13.

[6] Banc of America Securities estimates.

[7] Report on Cable Industry Prices, FCC Rcd 2718, 2721, at 12 (2005).

derive enormous benefits, if only fiber deployment was released from the restraints of the franchise process.

Streamlining the franchise process to allow more competitors will also help the cities and towns that currently award franchises. Competitive entry will provide additional revenue from franchise fees. In negotiations, the local franchise authority will have the ability to leverage its position, and argue that if one of the cable providers is willing to offer a specific service, the others interested in obtaining a franchise should also offer it.

Changes to the franchise regime could take on innovative characteristics. Key players in the cable and telecommunications industry have suggested provisions that would expedite the process. For example, new entrants could be offered a limited window to negotiate with the local authority, and if a new deal was not reached, the competitive entrant would be allowed to offer services under the same conditions as the existing franchise holder. Another option would be to begin franchise negotiations at the local level, but if an accord was not reached in a reasonable timeframe, the negotiation would be moved to the state level.[8] C4CC encourages the Commission to look at such novel arrangements as a way to promote cable competition.

The Commission should take this opportunity to promote new standards for local franchise authorities that promote competition and eliminate the regulatory burdens that are currently hindering deployment of new fiber and other competitive technologies.

III. Beyond the Language of the Statute, both Judicial and Legislative History also Provide Ample Support for the Commission's Authority to Act to Reduce Barriers to Competitive Entry Caused by the Franchising Process.

By 1990, the Commission had identified the franchising process as a potential barrier to competitive entry, explaining that the "regulatory activities of some local authorities may discourage or even preclude competing cable systems or other competing multi-channel media."[9]

With the 1992 Cable Act, Congress responded to the Commission's recommendations by revising Section 621; this revision placed several

[8] Jonathan Make and Anne Veigle, "NCTA, Verizon Back Similar Video Franchise Reform Proposals" *Communications Daily*, January 31, 2006.
[9] *See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, MM Docket No. 89-600, 67 Rad. Reg. 2d (P & F) 1771, ¶ 131 (July 31, 1990) ("*FCC Video Recommendation Report*").

limitations on the ways that Local Franchise Authorities (LFA) could exercise their franchising authority. Under the revised Section 621 an LFA "may not unreasonably refuse to award an additional competitive franchise."[10] It also provided a limited list of factors that can be considered in the decision to award a cable franchise. Section 621 provides that an LFA (1) must permit a new entrant "a reasonable period of time to become capable of providing cable service" within the franchise area, (2) may "require adequate assurance" that the new entrant will " provide adequate public, educational, and governmental access channel capacity, facilities, or financial support", and (3) may "require adequate assurance" that the new entrant "has the financial, technical, or legal qualifications to provide cable service."[11]

In addition to the plain language of the statute, the Conference Report on the 1992 Cable Act explained that "the conferees believe that exclusive franchises are directly contrary to federal policy and to the purposes of [the 1992 Cable Act], which is intended to promote the development of competition."[12] The report expressed a concern that the policies of the LFAs would "artificially protect the cable operator from competition," and a desire to prevent that from occurring. The report goes on to explain that the limited list of factors in Section 621(a)(4) factors were only intended to "specify that franchising authorities may require applicants for cable franchises to provide adequate assurance" concerning both PEG requirements and the applicant's qualifications.[13]

The House and Senate Reports on the legislation similarly reveal an intention to limit the discretion of the LFAs' and to foster competition. The House Report endorses the Commission's recommendation that Congress encourage competition by "prevent[ing] local franchising authorities from unreasonably denying a franchise to potential competitors who are ready and able to provide service."[14] The Senate Report indicates that similar factors in the Senate version of the bill were also meant to determine the reasonableness of an LFA's actions.[15] Together, these reports confirm that Congress intended Section 621 to be a meaningful restriction on the factors that an LFA could legitimately consider in reviewing a franchise application.

Finally, the Supreme Court has validated FCC rulemaking authority in areas of state and local control. For example, Section 621 of the 1996 Act

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[10] 47 U.S.C. § 541(a)(1).
[11] *id.* § 541(a)(4)
[12] *Cable Television Consumer Protection and Competition Act of 1992*, H. Rep. No. 102-862, at 77 (1992).
[13] *Id.* at 78
[14] *Cable Television and Consumer Protection and Competition Act of 1992*, H. Rep. No. 102-628, at 46 (1992)
[15] *See Cable Television Consumer Protection Act of 1991*, S. Rep. No. 102-92, at 91 (1991).

clearly envisioned a role for the Commission in ensuring that state and local actors do not sabotage the competitive intentions of the Act. Under *Iowa Utilities*,[16] the FCC has general jurisdiction to implement the 1996 Act's local-competition provisions. Since Congress expressly directed that the Act be inserted into the Communications Act of 1934, and since the 1934 Act already provides that the FCC "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act," 47 U.S.C. § 201(b), the FCC's rulemaking authority extends even to the implementation of those provisions which involve state and local issues. In spite of provisions like 152(b) which purport to limit the FCC's authority with respect to state and local authority, the 1996 Act clearly applies to intrastate matters, and its inclusion within the 1934 Communications Act demonstrates Congress' intention that the FCC should have rulemaking jurisdiction over such matters.

The Commission has ample authority under Section 621 to begin rulemaking provisions to establish guidance for Local Franchise Authorities in determining what terms, conditions, and negotiating tactics will be considered an unreasonable refusal to approve a competitive cable franchise. And we urge the Commission to act promptly to remove this most significant barrier to cable choice.

IV. In Addition to Violating Section 621, Local Franchise Authorities who Attempt to Impose Conditions which Constitute an Unreasonable Refusal to Grant a Competitive Cable Franchise, are also Infringing on the First Amendment Rights of the Competitive Cable Provider.

In addition to the guidance of Section 621 in determining the appropriate scope of franchise negotiations, the First Amendment also provides important limitations on the Local Franchise Authority's ability to impose onerous conditions which are not related to provisioning cable television. In Time Warner I[17] the Supreme Court determined that

> "Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. Leathers v. Medlock, 499 U.S. 439, 444, 113 L. Ed. 2d 494, 111 S. Ct. 1438 (1991). Through "original programming or by exercising editorial discretion over which stations or programs to include in its repertoire," cable programmers and operators "seek to communicate messages on a wide variety of topics and in a wide variety of formats." Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494, 90 L. Ed. 2d 480, 106 S. Ct. 2034 (1986)."

[16] 525 US 366 (1999)

[17] Turner Broad. Sys. v. FCC, 512 U.S. 622, 636-637 (U.S. 1994) *Time Warner I*

However, the court also recognized that not all speech is entitled to the same degree of protection under the First Amendment, and determined that restrictions on a cable operator's free speech rights need only survive under intermediate scrutiny.

In Turner I and II the Supreme Court was evaluating the constitutionality of the must carry provisions of the 1992 Cable Act, and the court found that "By requiring cable systems to set aside a portion of their channels for local broadcasters, the must-carry rules regulate cable speech in two respects: The rules reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining," and these two limited abridgments of the cable operator's right to free speech were sufficient to trigger a Constitutional question.

In the context of the cable franchise process, a Local Franchise Authority who unreasonably refuses to grant a competitive cable franchise is not simply limiting the free speech rights of the competitive cable operator, but completely precluding them from exercising any of those rights. While a Local Franchise Authority might be able to find a compelling governmental interest in planting flower boxes, rewiring street lights, and other egregious franchise terms, it is virtually impossible for them to demonstrate that withholding a cable franchise is the least restrictive means of achieving those objectives, or even that those objectives are reasonably related to any restrictions of the First Amendment rights of the cable operator.

The provisions of section 621(a)(4) offer more than just Congressional guidance about the appropriate scope of the local franchise process. They provide an outer limit beyond which action by a Local Franchise Authority will not only be unreasonable under Section 621, but also an unconstitutional infringement upon the first amendment rights of the cable operator.

V. Under Section 621 the FCC Can and Should Take Immediate Action to Establish Federal Rules for What Constitutes Unreasonable Franchise Terms.

Under Section 621(a)(4) Congress has provided the Commission with statutory guidance as to what it considers reasonable franchise terms. As a starting point, any franchise term not directly related to the limited factors set forth in Section 621(a)(4) should be presumptively unreasonable. This will go a long way toward reigning in some of the most egregious LFAs, but for cable customers who were just hit with the latest round of price increases, time is of the essence. Thus, in addition to curtailing blatantly inappropriate extortion by the LFAs, the Commission must also establish reasonable parameters for each of the factors enumerated in Section 621(a)(4) and must establish a timeline beyond which the LFAs will be deemed to be acting unreasonably. The relevant factors from Section 621(a)(4) are: (1) must permit a new entrant "a reasonable period of time to become capable of providing cable service" within the franchise area; (2) "requir[ing] adequate assurance" that the new entrant "will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support"; and (3) "requir[ing] adequate assurance" that the new entrant "has the financial, technical, or legal qualifications to provide cable service." In addition, the Commission must set a limit on how long the franchise process can take before it is considered unreasonable.

First, with regard to "build out" requirements, American Civil Liberties Union v FCC (1987, App DC) 823 F2d 1554 held that the anti-redlining provisions of Section 621(a)(3) did not provide a basis for requiring a cable operator to wire an entire franchise area. Furthermore, as far back as 1990 the Commission has recognized that concerns with "cream skimming" are overblown because "the nature of the broad-based demand for cable services should minimize the prospect that in the long term new entrants would find it profitable to only serve limited groups of homes within a metropolitan area."[18] Indeed, several recent studies indicate that the traditionally underserved communities which section 621(a)(3) sought to protect actually spend more than their counterparts on cable and telecommunications services suggesting that the Commission's findings in 1990 are at least as valid today as they were back then. All of which suggests that if a competitive cable operator can demonstrate a facially neutral business purpose for requesting a smaller franchise area, then it would be unreasonable for the LFA to arbitrarily require the competitor to "build out" to their entire franchise area.

Next, with regard to "adequate public, educational, and governmental access channel capacity, facilities, or financial support," the key phrase is "or financial support." The LFA certainly ought to be able to require the competitive cable operator to provide the same number of PEG channels that they are using on incumbent provider's network, but the clear language of the statute suggests that financial contributions in addition to providing PEG channels ought to be the exception rather than the rule. Thus, it would be unreasonable for an LFA to request more PEG channels than they are currently using and or financial contributions from the competitive cable provider.

However, the "financial support" clause should not lead the Commission to limit the LFA's authority to collect franchise fees. It is well established that communities can collect fees for use of rights of way. The

[18] *See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, MM Docket No. 89-600, 67 Rad. Reg. 2d (P & F) 1771, ¶ 139 n. 198 (July 31, 1990) ("*FCC Video Recommendation Report*")

Commission should respect this revenue stream, seeking only to ensure that franchise fees are levied equally between incumbent cable providers and new entrants.

Third, for publicly traded companies, the new Sarbanes Oxley reporting requirements should ensure that the companies public financial records would provide an LFA with enough information to feel "adequate assur[ed]" that the new entrant "has the financial, technical, or legal qualifications to provide cable service." In the absence of extraordinary circumstances which call into question the financial, technical, or legal qualifications of the competitive cable provider, exceptional assurances like performance bonds or letters of credit would certainly be unreasonable.

Finally, and perhaps most importantly, time is of the essence. According to a recent GAO study, cable prices are 15 percent lower in areas where there is a wireline cable competitor. More recently, when providers like Verizon have entered the market prices dropped by as much as 30-50 percent! Thus, every day of delay in the franchise process is costing consumers between 50 cents and $1, so we would ideally like to see an expedited 30 day review window for LFAs, but we recognize that the present franchise process may require more time. Section 626(c)(1) mandates a 4 month review timeline for franchise renewals. Given the limited number of factors which the LFA can appropriately consider we believe that this is also the appropriate standard for review of competitive franchise applications. Thus any review beyond 4 months would be unreasonable on the part of the LFA without some showing of extraordinary circumstances.

V. Conclusion – The Twin Goals of Video Competition and Expanded Consumer Benefits Can Be Achieved

Competition for cable services has long been a federal policy goal, and under Section 621 the Commission has not just the right, but the obligation to ensure that the franchise process does not prevent consumers from enjoying the benefits of cable choice. Unfortunately, the franchise process is the primary reason that new wireline competitors have not entered the video service market. Consumers are still unable to choose among a multiple of providers and service offerings.

The Commission has before it a great opportunity to develop robust cable competition and empower consumers simultaneously. By establishing clear timelines and standards of reasonableness, the Commission can ensure that the 98 percent of Americans who do not currently enjoy the benefits of cable choice will soon be able to change the channel or change providers. Streamlining the franchise process will encourage new providers to enter the cable market, provide incentives for development new technologies and services, offer consumers more choices and lower prices, and deliver new applications and benefits that will improve consumers' quality of life.

To achieve the goals of greater competition and expanded consumer benefit, the Commission must act swiftly. The technology is ready to be deployed. Providers are prepared to offer services. Traditional franchising is standing in the way. Consumers for Cable Choice urges the Commission to create a new franchising standard, complying with existing laws and directives to remove barriers to competition and market entry, and bring the wonders of advanced broadband video services to all Americans.

Respectfully submitted,

Consumers for Cable Choice

By: ___________________
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DATE